SUPREME COURT, U. S.

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No. 500

In the Supreme Court of the United States

OCTOBER TERM, 1961

W. N. MOREHOUSE, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MOTION TO AFFIRM

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Section 203(a)(15) — 7

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Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court, which sustained an order of the Interstate Commerce Commission directing appellant Morehouse to cease and desist from conducting unauthorized motor carrier operations. Morehouse is a

common carrier by motor vehicle authorized to transport, between specified points over irregular routes, various commodities including "packinghouse products and supplies." In a proceeding to determine the scope of Morehouse's certificate the Commission, after full administrative proceedings, held that the term "packinghouse products" does not authorize the transportation of such related commodities as soap, washing compound, and vegetable oil which are not in fact produced or distributed by meat packinghouses (J.S. App. 11).

The Commission found that Morehouse had been transporting such commodities as soap and soap products for shippers which were not meat packinghouses, but were either manufacturers of such products, or distributors of such products that had not been manufactured by packinghouses. Noting that it had frequently construed the term "packinghouse products" in grants of operating authority as including only those articles which were actually produced or distributed by packinghouses, the Commission concluded that products "such as the soap and lux liquid produced by Lever Brothers, are not, in fact, products of a packinghouse, and hence do not fall within the generic description 'packinghouse products'" (J.S. App. 10).

The Commission pointed out that in an earlier general proceeding in which it specified the particular commodities covered by the term "packinghouse products" (*Modification of Permits—Packing House Products,* 46 M.C.C. 23, 48 M.C.C. 628; *Descriptions in Motor Carrier Certificates,* 61 M.C.C. 209), no dis-

tinction was made between contract and common carriers. The Commission rejected Morehouse's contention that since he was a common carrier obligated to serve all shippers he was entitled to transport any commodity that packinghouses produce, even though the particular products were not produced or distributed by a packinghouse. The Commission stated that "while we agree with [Morehouse] that as a common carrier he is not limited as to the shippers he may serve, this does not mean either that the limitations inherent in his commodity authorization can be ignored, or that the commodity description 'packinghouse products' in a certificate authorizes any different transportation, commoditywise, than the same authority in a permit" (J.S. App. 10–11).

Petitions for reconsideration were denied by the full Commission, and the three-judge district court unanimously sustained the Commission's decision (J.S. App. 1–6).

ARGUMENT

The sole question presented by this appeal is whether the Interstate Commerce Commission properly interpreted the meaning of the phrase "packinghouse products" in one of its common carrier certificates. After full administrative proceedings, the Commission, in accordance with its settled construction of the term, held that the commodity description "packinghouse products" includes only those items which were in fact either produced or distributed by packinghouses. It is axiomatic that the interpretation of a Commission certificate is pri-

marily a question for the agency (*Service Transfer Co.* v. *Virginia*, 359 U.S. 171), and that the Commission's interpretation will be sustained "unless clearly erroneous" (*Nelson* v. *United States*, 355 U.S 554, 558). The district court held that the Commission's interpretation of Morehouse's certificate was not shown to be "clearly wrong" or lacking factual or legal support (J.S. App. 6). This decision is correct and this appeal presents no substantial question calling for plenary review by this Court.

1. The Interstate Commerce Commission "from the beginning of motor-carrier regulation has identified the commodities authorized to be transported in three principal ways: (a) by naming them specifically * * * (b) by the use of generic or class terms, and (c) by reference to the intended future use" (*C & H Transportation Co., Inc.—Interpretation of Certificate*, 62 M.C.C. 586, 587). In defining the scope of operating authority, however, the Commission has always given the same terms the same meaning for both common and contract carriers. With respect to those specialized motor carriers, including the appellants, authorized to serve the meat packing industry, the Commission has consistently defined their operating authority in terms of "packinghouse products" rather than in broader terms like "such products as are produced and distributed by packinghouses," which the Commission has sometimes used for other commodities.[1] The Commission has treated the grant of

[1] See, e.g., *Interstate Commerce Commission* v. *Ratner*, 6 Fed. Carriers Cases ¶ 80, 415 ("such merchandise as is dealt in

authority to carry "packinghouse products" as covering only "a particular class of commodities which are produced by and distributed by meat packinghouses" (*Crispens Truck Lines, Inc.—Investigation of Operations,* 63 M.C.C. 625, 630), but not the same products when manufactured by someone other than a packinghouse. *Dart Transit Co.* v. *Interstate Commerce Commission,* 110 F. Supp. 876 (D. Minn.), affirmed, 345 U.S. 980; *Safeway Truck Lines, Inc.—Investigation of Certificate,* 74 M.C.C. 679; *Haugarth—Investigation and Revocation of Certificate,* 83 M.C.C. 395.

The Commission explained the reason for this limitation in the *Chrispens* case, *supra.* In rejecting the contention that authority to haul "packinghouse products" also included products produced or distributed by non-packers, the Commission stated (p. 629):

> If construed as respondent would have us construe its authority, the interpretation would extend the carrier's rights far beyond that intended or even proposed * * * and permit it to serve the needs of many other industries in the transportation of commodities not in fact produced or distributed by meat packinghouses. For example, items classified under packinghouse products in item (c) [of the *Modification* report, 46 M.C.C. at 33] include soap,

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by wholesale food business houses"); *Anton Vidas—Contract Carrier Application,* 62 M.C.C. 106 ("such commodities as are sold by retail mail-order houses"); *National Trucking Co.—Extension, Electrical Appliances,* 51 M.C.C. 638 ("such commodities as are dealt in by wholesale and retail hardware stores").

> soap products, chemicals, chemical compounds, advertising matter not further identified, and many other specific and generic terms. If respondent's interpretation were correct it might transport the vast output of soap factories and chemical factories which have no connection with packinghouses and all the advertising matter put out by these and other industries. * * *

In *Nelson* v. *United States,* 355 U.S. 554, this Court upheld the Commission's ruling that a contract carrier permit authorizing the transportation of "stock in trade of drug stores" did not cover other "goods such as are sold in drug stores" (p. 559). The Court noted (*ibid.*) that "such a reading enlarges the ordinary meaning of the words," and it stated (p. 560, footnote omitted) that "if the Commission's purpose has been to authorize transportation of goods like those named in the permit, that purpose consistently has been revealed by use of the phrase 'such as,' or a close variation thereof." See note 1, *supra,* pp. 4–5.

Appellants, although conceding that, in the case of *contract* carriers, "packinghouse products" do not include products made or distributed by non-packers, urge that a different result should obtain when *common* carriers are involved (J.S. 16). The argument is that, since a common carrier must serve all shippers, and since it may carry "packinghouse products," it may do so for all shippers, not just for packinghouses. The short answer is that the term "packinghouse products" is a description of the kind of commodity to be carried, not of the class of shippers to be served. The appellant carriers are free to serve all shippers

(see *infra*, Point 2); in serving such shippers, however, they may carry only the commodities they are authorized to transport, namely, "packinghouse products." And, as noted, that term covers only products manufactured or distributed by packinghouses. The Commission has used the same words for both common carrier certificates and contract carrier permits. Although both the decision of this Court in the *Nelson* case, *supra*, and of the Commission in the *Chrispens* case, *supra*, involved contract carriers, their reasoning is equally applicable to common carriers.

2. As both the Commission (J.S. App. 11) and the district court (J.S. App. 4) found, a commodity description has the same meaning whether the particular authority involved is the certificate of a common carrier or the permit of a contract carrier. While appellant Morehouse, unlike a contract carrier (see § 203(a)(15) of the Act (49 U.S.C. 303(a)(15)), may not be restricted as to the shippers he may serve, the certificate in the present case is not "unrestricted, because by its very terms the transportation authorized therein is limited to a certain class of commodities, namely, 'packinghouse products'" (J.S. App. 10). As long as appellants transport the goods identified by their certificates, they are as free as common carriers to serve anyone tendering such traffic, whether producer, wholesaler, distributor, retailer, warehouseman or other. But, as the Commission concluded (J.S. App. 11), "the fact that [appellants are] unrestricted as to the shippers [they] may serve affords no basis whatever for the expansion of the

scope of the commodity description 'packinghouse products' in [appellants'] or any other certificate over and above that which is authorized by the same commodity description in any permit issued by this Commission."

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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